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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES W. FAIRMAN, Warden,
Joliet Correctional Center,

Petitioner,

v.

MIGUEL ESPINOZA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

Should this Court's decision in *Michigan v. Jackson*, ____ U.S. ____, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986) be retroactively applied to collateral review of final convictions?

II.

After *Michigan v. Mosley*, 423 U.S. 96 (1975) and *Michigan v. Jackson*, ____ U.S. ____, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986), do the fifth amendment and the *Edwards v. Arizona*, 451 U.S. 477 (1981) *per se* rule require suppression of a post-arrest confession to murder because respondent accepted the appointment of counsel during an earlier arraignment for an unrelated weapons charge?

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PRAYER

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner James W. Fairman, Warden of the Joliet, Illinois Correctional Center, respectfully prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Seventh Circuit. With respect to the first question presented for review, petitioner also seeks a writ of *certiorari* to summarily reverse the judgment entered below.

OPINIONS BELOW

A copy of the unreported opinion on direct appeal from conviction in *People v. Espinoza*, No. 82-1080 (Ill. App. Ct. August 31, 1983) has been included within the appendix at pages 35-40. A copy of the unreported memorandum opinion granting habeas corpus relief in *United States ex rel. Espinoza v. Fairman*, No. 84 C 7603 (N.D. Ill. March 12, 1985) may be found at appendix pages 21-34. *Certiorari* is sought to review the decision of the United States Court of Appeals in *United States ex rel. Espinoza v. Fairman*, No. 85-1486 (7th Cir. February 25, 1987), and a copy of the slip opinion has been appended at appendix pages 1-20.

JURISDICTION

On February 25, 1987, the United States Court of Appeals for the Seventh Circuit affirmed a district court decision to issue a writ of habeas corpus under 28 U.S.C. § 2254. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the

land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. The Offenses

At approximately 2:00 a.m. on August 24, 1980, a twenty-five year old school teacher named Frank Foys, Jr. escorted his girlfriend home and walked to a bus stop in Chicago, Illinois. Respondent Miguel Espinoza and two other men confronted Foys. Espinoza was armed with a .25 caliber semi-automatic pistol, and he released a bullet into the pistol chamber as the men approached Foys. After the men forced Foys against a wall, Espinoza fired a single shot which fatally wounded the victim. Espinoza then removed a watch and wallet from Foys. When they discovered the body, police officers noticed that the pockets of Foys' clothing had been turned inside out.

B. The Arrest And Confession

On August 29 of that year, Chicago police officers were summoned to investigate a report of a man with a gun inside a tavern. After they discovered a gun during a pat-down frisk of respondent, Espinoza was arrested, charged, and taken into custody for the misdemeanor offense of unauthorized use of weapons.

At some point between August 29 and September 3, an assistant public defender was appointed to represent Espinoza. Respondent and his lawyer appeared at arraignment for the weapons charge. While Espinoza remained in custody, ballistics tests performed on the confiscated gun suggested that the weapon was used to commit the Foys murder.

On September 3, an assistant state's attorney initiated custodial interrogation and questioned Espinoza about the Foys murder. The state's attorney did not know that counsel had been appointed for the weapons charge, and he did not question Espinoza about that crime. The state's attorney twice cautioned respondent about his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Espinoza declined the services of a lawyer, agreed to answer questions, and gave oral and written confessions to the Foys murder.

The next morning the state's attorney filed a murder charge, and the weapons case was later dismissed. After his suppression motion incorporating fifth and sixth amendment claims was denied, Espinoza proceeded to a bench trial where his confession was received as the State's principal evidence. Espinoza was convicted for the crimes of murder and armed robbery of Frank Foys, Jr.

C. Direct Appeal From Conviction

The Illinois appellate court rejected respondent's fifth and sixth amendment claims because respondent had not requested the services of an attorney during questioning about an uncharged murder. Leave to appeal to the Illinois Supreme Court was subsequently denied.

D. Federal Habeas Corpus Proceedings

Respondent then sought habeas corpus relief, and the district court judge held for Espinoza on several grounds. Applying *Edwards v. Arizona*, 451 U.S. 477 (1981), the judge first found a fifth amendment violation. Notwithstanding respondent's *Miranda* waivers, a request for counsel during the September 3 interrogation was implicit in Espinoza's acceptance of counsel at the earlier arraignment, the judge reasoned. This request for counsel during a felony murder investigation was found even though counsel had been appointed in connection with a misdemeanor weapons offense. Although Espinoza had conferred with counsel at arraignment, the judge also construed *Edwards* to require the actual presence of an attorney during questioning.

Turning to the sixth amendment claim, the court decided that the murder charge was "procured pursuant to" the weapons arrest. The court then ruled in Espinoza's favor because respondent was questioned about an uncharged murder after judicial proceedings for the weapons charge had begun. In an alternative holding, the judge decided that the sixth amendment did not permit investigation into misconduct committed before the weapons charge. Finally, the judge rejected the State's argument that a valid sixth amendment waiver can be found in voluntary responses to questions after *Miranda* rights admonishment.

On appeal, the circuit court rejected all but one of Espinoza's arguments. That court agreed that respondent had no sixth amendment right to counsel in the absence of a formal murder charge. The court also agreed that Espinoza's murder and weapons offenses were unrelated crimes. Applying *Edwards* and the recent decision in *Michigan v. Jackson*, ____ U.S. ____, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986), however, the Court of Appeals held that Espinoza asserted his fifth amendment right when he accepted counsel at arraignment. In that court's view, a request made at arraignment assures the right to counsel during subsequent investigation into *any* crime whatsoever as long as the suspect remains in continuous police custody.[1]

Petitioner conceded exhaustion of state remedies, and the decision below does not rest on any alternative state ground.

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[1] The district court had also questioned Espinoza's ability to give a knowing and intelligent waiver. After reviewing the record, the Seventh Circuit noted respondent's argument but was unwilling to conclude that the waiver was involuntary in the traditional sense.

REASONS FOR GRANTING CERTIORARI

I.

THE *MICHIGAN v. JACKSON*, ___ U.S. ___, 106 S. CT. 1404, 89 L. ED. 2D 631 (1986) DECISION SHOULD NOT BE RETROACTIVELY APPLIED ON COLLATERAL REVIEW OF FINAL CONVICTIONS.

Espinoza sought habeas corpus relief to vacate his state court convictions for murder and armed robbery. After briefing had been completed in the Court of Appeals, this Court rendered its decision in *Michigan v. Jackson*, ___ U.S. ___, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986). Because the lower court improperly applied *Jackson* to this case, petitioner seeks both a writ of *certiorari* and summary reversal. The *Jackson* decision should not have been applied on collateral review of these final convictions.

This Court did not address the retroactivity issue in the *Jackson* opinion itself. Retroactivity has now become a vital concern for the lower courts, however. *See, e.g., Collins v. Kemp*, 792 F.2d 987, 988-89 (11th Cir. 1986) (granting a stay of execution and expressing uncertainty in this area).

Reviewing a sixth amendment claim in *Jackson*, this Court applied *Edwards v. Arizona*, 451 U.S. 477 (1981) by analogy to fashion a new rule governing confessions given after counsel requests have been made at arraignment. Courts are not constitutionally compelled to give a decision retroactive effect, *Linkletter v. Walker*, 381 U.S. 618, 629 (1965), and this Court has generally ordered prospective application of new rules for custodial interrogations. In *Johnson v. New Jersey*, 384 U.S. 719 (1966), for example, this Court withheld retroactive effect for the *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Escobedo*

v. Illinois, 378 U.S. 478 (1964) decisions. In *Solem v. Stumes*, 465 U.S. 638 (1984) and *Shea v. Louisiana*, 470 U.S. 51 (1985), in turn, application of the *Edwards* rule was limited to cases pending on direct appeal.

By applying the *Stumes*, *Linkletter* and *Stovall v. Denno*, 388 U.S. 293, 297 (1967) criteria, this Court should now deny retroactivity for the *Jackson* prophylactic rule as well. The need for retroactivity is lessened here because defendants remain free to litigate the voluntariness of their confessions by traditional means. *Stumes*, 465 U.S. at 644. Equally important, this Court has already noted the disruptive effect of retroactivity upon the criminal justice system. *Id.* at 650. Moreover the *Jackson* and *Edwards* rules do not enhance the accuracy of the trial process. *Id.* at 643-44. Finally, the prosecutor in this case could not have been expected to anticipate the *Jackson* decision. By fashioning a "bright-line rule", *Jackson* may have resolved earlier confusion within the lower courts. 106 S. Ct. at 1410, 89 L. Ed. 2d at 641. These courts had not anticipated the *Jackson* result, however. *See, e.g., Jordan v. Watkins*, 681 F.2d 1067, 1072-74 (5th Cir. 1982) and *Collins v. Francis*, 728 F.2d 1322, 1332-34 (11th Cir.), *cert. denied*, 469 U.S. 963 (1984).

"At a minimum, nonretroactivity means that a decision is not to be applied in collateral review of final convictions." *Stumes*, 465 U.S. at 650.[2] During habeas corpus review, the justification for finality of judgments is strongest, and the costs outweigh the benefits of retroactivity. *Stumes*, 465 U.S. at 653-54 (Powell, J., concurring). *Cf.*

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[2] *But see Griffith v. Kentucky*, ___ U.S. ___, 107 S. Ct. 708, 716, 93 L. Ed. 2d 649, 662 (1987) (Powell, J., concurring) (the retroactivity standard for "clear break" cases on collateral review may remain an open question).

Allen v. Hardy, 478 U.S. ____, 106 S. Ct. 2878, 92 L. Ed. 2d 199 (1986) (also refusing retroactive application for collateral review).

In this case, just as in *Stumes* and in *Allen*, a habeas appeal was pending at the time of the new decision. Upon the authority of those decisions, petitioner respectfully submits that retroactivity was improper and that summary reversal is appropriate.

II.

ALTHOUGH RESPONDENT ACCEPTED THE APPOINTMENT OF COUNSEL DURING AN ARRAIGNMENT FOR AN UNRELATED WEAPONS CHARGE, THE *EDWARDS v. ARIZONA*, 451 U.S. 477 (1981) AND *MICHIGAN v. JACKSON*, ____ U.S. ____, 106 S. CT. 1404, 89 L. ED. 2D 631 (1986) RULES SHOULD NOT REQUIRE SUPPRESSION OF HIS SUBSEQUENT CONFESSION TO MURDER.

During this custodial interrogation conducted by an assistant state's attorney, Espinoza clearly had a right to confer with counsel to protect his fifth amendment privilege against self-incrimination.[3] *Miranda v. Arizona*, 384 U.S. 436 (1966). If Espinoza had asserted that right to counsel during questioning, further police-initiated interrogation would have been forbidden until Espinoza had seen a lawyer. *Edwards v. Arizona*, 451 U.S. 477 (1981). Because Espinoza accepted the appointment of counsel at arraignment, the *Edwards per se* rule may apply in this case. *Michigan v. Jackson*, ____ U.S. ____, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986).

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[3] The lower court apparently perceived an independent fifth amendment right to counsel requiring protection by a *per se* rule. *Compare United States v. Gouveia*, 467 U.S. 180, 188, n. 5 (1984).

In *Jackson*, this Court used *Edwards* by analogy to suppress a confession on sixth amendment grounds. The application of the *Jackson* rule to fifth amendment claims is presently unclear, however. This Court expressed "no comment" on *Jackson*'s fifth amendment claim rejected by the state courts. *Id.* at 1408, n. 4 and at 639, n. 4. Departing from the decisions of the other federal courts (slip op. at 12-13, n. 5 and cases cited therein), the Court of Appeals broadly interpreted Espinoza's *sixth* amendment request[4] during arraignment to find a *fifth* amendment assertion then as well. (slip op. at 5-6 and 11-12). Unlike Jackson's sixth amendment assertion at arraignment, Espinoza's fifth amendment request before interrogation may have been premature. *Id.* at 1412, n. 2 and at 644, n. 2 dissenting opinion expressing the view that the fifth amendment privilege must be asserted during interrogation). *But see Johnson v. Virginia*, 221 Va. 736, 273 S.E. 2d 784, *cert. denied*, 454 U.S. 920 (1981) (Marshall, J., dissenting).

Notwithstanding *Jackson*'s possible application to fifth amendment claims generally, there are compelling reasons to reject a *per se* rule in this particular case. At the time of his arraignment, neither the government nor Espinoza knew that he would be interrogated about the murder. (slip op. at 3). Although this Court has broadly construed the legal basis for a counsel request, *Jackson*, 106 S. Ct. at 1409, n. 7, 89 L. Ed. 2d at 641, n. 7, this Court may not conclude that Espinoza sought the services of a lawyer for an interrogation he did not anticipate. *Cf. Connecticut v. Barrett*, 479 U.S. ____, 107 S. Ct. 828, 93 L. Ed. 2d 920

Representation by counsel was accepted, rather than requested, by respondent Espinoza. The lower court decided that this distinction is "not relevant". (slip op. at 12, n. 4).

(1987) (where defendant's willingness to speak was found despite his limited request for counsel). The suspect exercises control over the course of the interrogation, *Id.* at 831 and at 927, and the suspect who has previously sought counsel for one offense may change his mind and willingly speak about another. *Cf. Edwards*, 451 U.S. at 490 (dissenting opinion).

As a matter of fifth amendment law, the *Edwards* and *Jackson* decisions should not apply when government officials seek to question a suspect about a second and unrelated crime. The lower court found that "'the weapons offense and the murder were, in every constitutionally significant aspect, separate crimes'". (slip op. at 8, n. 1). In the proceedings reviewed in *Michigan v. Mosley*, 423 U.S. 96 (1975), Mosley invoked his right to silence[5] concerning two robberies before he confessed to murder. The confession to "a crime different in nature and in time and place of occurrence" was held to be admissible. *Id.* at 105. The *Miranda* rule did not create a proscription of indefinite duration "upon any further questioning by any police officer on any subject". *Id.* at 102-104. Here, as in *Mosley*, the official's questioning "about an unrelated homicide was quite consistent with a reasonable interpretation" of his earlier assertion. *Id.* at 105. *See also Hoffa*

[5] Mosley asserted his fifth amendment right to silence but, according to the lower court, waivers of the right to counsel are to be treated in the same manner as waivers of the privilege. (slip op. at 11, n. 3). *See also Stumes*, 465 U.S. at 648: "while *Mosley* did distinguish the right to counsel from the right to silence . . . much of the logic and language of the opinion could be applied to the invocation of the former" (citations deleted) and *Stumes v. Solem*, 752 F.2d 317, 321, n. 4 (8th Cir. 1985) (following this direction on remand). *See generally Mosley*, 423 U.S. at 102, as cited with approval in *Edwards*, 451 U.S. at 491, n. 1 (dissenting opinion) (also minimizing the significance of the distinction).

v. United States, 377 U.S. 201, 207 (1964) (where continued investigation into other suspected criminal activities of the indicted defendant was "entirely proper"); *Maine v. Moulton*, 474 U.S. 159 (1985) (where all nine members of this Court agreed that post-indictment statements concerning other crimes were "of course" admissible at trials for those offenses); *State v. Buckles*, 636 S.W.2d 914 (Mo. Sup. Ct. 1982) (murder confession deemed admissible although the suspect asserted his fifth amendment counsel right for a robbery); and *United States v. Udey*, 748 F.2d 1231, 1241, n. 5 (8th Cir. 1985) (observing that "no definite statement" has been made here).

The "scrupulous observance" of a suspect's asserted constitutional rights provides the appropriate means to reconcile the *Mosley*, *Edwards*, and *Jackson* decisions. *Stumes*, 752 F.2d at 321 (applying pre-*Edwards* law on remand and deciding that officers had "scrupulously honored" a counsel request). *Per se* rules have been adopted to eliminate the possibility that police officers will "badger" a suspect and seek to overcome his will. *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983) (plurality opinion). When no attempt has been made to circumvent the suspect's asserted right, however, subsequent interrogation should be permitted. Espinoza was given fresh *Miranda* warnings after a significant passage of time, and respondent has agreed that the procedure employed comported with the *Miranda* decision. The interrogation was then restricted to a crime which was not the subject of his earlier assertion. Unlike defendants Jackson and Bladel, respondent knew he was represented by counsel. Indeed, Espinoza had seen his lawyer before this interrogation began. Unlike defendant Edwards, respondent was never told he was obligated to answer questions. Espinoza never halted the interrogation, never sought the services of the lawyer that

he knew, and never indicated any unwillingness to talk to the state's attorney. Espinoza's decision to talk about the Foys murder was a knowing and intelligent decision under *Johnson v. Zerbst*, 304 U.S. 458 (1938).

By applying the *Edwards* and *Jackson per se* rules in a mechanical fashion, the lower court created an unprecedented immunity for offenders fortuitously charged with unrelated crimes.[6] Police officers may wish to question an arrestee about other crimes, however, in a practice which serves to benefit the community and possibly the suspect himself. The *Miranda* right to counsel should not be transformed into an "irrational obstacle to legitimate police investigative activity". *Mosley*, 423 U.S. at 102, as cited with approval in *Edwards*, 451 U.S. at 491, n. 1. Just as the sixth amendment right to counsel is limited to the specific crime for which the accused has been charged (slip op. at 16), the *Edwards* and *Jackson* rules should be limited to the specific crime for which the services of counsel have been requested.

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[6] The lower court ruling is limited to interrogations conducted while the suspect remains in continuous police custody. *Accord, Lindsey v. State*, 485 N.E.2d 102, 105 (Ind. Sup. Ct. 1985) (*Edwards* does not control if defendant has been re-arrested). Although this restriction would relieve the serious problem presented by serial offenses in different states, this restriction may be inappropriate. If the stationhouse environment is inherently coercive, then presumably the arraignment request bars any police-initiated custodial interrogation for which the "medium" of counsel has been requested.

CONCLUSION

For these reasons, petitioner respectfully seeks a writ of *certiorari* to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-1486

UNITED STATES OF AMERICA ex rel.
MIGUEL A. ESPINOZA,

Petitioner-Appellee,

v.

J.W. FAIRMAN, Warden,

Respondent-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 7603—**John F. Grady**, *Chief Judge.*

ARGUED APRIL 8, 1986—DECIDED FEBRUARY 25, 1987

Before COFFEY, FLAUM, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

FLAUM, *Circuit Judge.* The petitioner, Miguel Espinoza, was arrested on a weapons charge. At his arraignment on that charge, he was represented by counsel. Subsequently, while Espinoza was still in custody, the police interrogated him concerning a murder. Espinoza, who was not represented by counsel at that interrogation, confessed to the murder. At his trial on the murder charge, Espinoza moved to have his confession suppressed. The state trial court denied his motion and subsequently convicted him of murder.

After exhausting his state remedies, Espinoza petitioned for a writ of habeas corpus. The district court granted the petition, holding that Espinoza had both a Fifth Amendment and a Sixth Amendment right to have counsel at the interrogation, and that he had not knowingly and voluntarily waived those rights. Because the state had not yet begun to prosecute Espinoza on the murder charge at the time he confessed, we conclude that Espinoza had no Sixth Amendment right to counsel at the police interrogation concerning that crime. However, because Espinoza invoked his Fifth Amendment right to counsel at his arraignment on the weapons charge, we conclude that the state was barred from initiating an interrogation of Espinoza without counsel concerning any crime for as long as he remained in continuous police custody. We therefore affirm the decision of the district court.

I.

On August 29, 1980, Chicago police officers arrested the petitioner, Miguel Espinoza, on a charge of unauthorized use of a weapon. The police placed Espinoza in the Cook County Jail to await trial. At some point between August 29 and September 3, a public defender, who was appointed to represent Espinoza, appeared on his behalf at his arraignment on the weapons charge.

While Espinoza remained in custody, the police conducted tests on the gun taken from him at the time of his arrest. Based on these tests, the police concluded that Espinoza's gun had been used to kill Frank Foy, a twenty-five year old Chicago teacher who had been shot to death on August 24, 1980.

On September 3, 1980, Assistant State's Attorney Brian Collins interviewed Espinoza regarding the murder. Although Collins was aware that the police had taken Espinoza into custody on the weapons charge, he did not ask Espinoza whether he had a lawyer. Collins did, however, give Espinoza his *Miranda* warnings, which stated that if Espinoza wanted a lawyer present he could have

one. Collins then asked Espinoza if he wanted to waive his rights. Espinoza agreed to do so—first orally and then, during the interrogation, by signing a waiver form. Although the record is somewhat unclear, it appears that, at the time Collins first asked Espinoza to waive his rights, Espinoza did not know that he was going to be interviewed about the Foy murder.

Collins conducted the interrogation in English. However, he did not ask Espinoza, a native Mexican, if he understood English or if he wanted to have an interpreter present. Although Espinoza answered in English, his answers consisted primarily of "yes" or "no" responses. After only fifteen to twenty minutes of questioning, Espinoza confessed that he and two of his friends had murdered Frank Foy.

The next morning, based on his confession, the state filed a complaint against Espinoza, charging him with murder. The state later dropped the weapons charge.

Espinoza did not stand trial for a year and a half. The trial judge initially ordered Espinoza held in jail pending a psychiatric evaluation of his competence to stand trial. While in jail, Espinoza attempted to commit suicide. He was subsequently placed in the Chester Mental Health Center. Five different mental health professionals examined Espinoza during this year and a half period. Four of the five believed Espinoza mentally unfit to stand trial.

On March 3, 1982, the court held a hearing to determine whether Espinoza was capable of standing trial. One psychiatrist testified that, based on an electroencephalogram which showed no abnormalities, he believed that Espinoza was pretending to be mentally ill. Another psychiatrist testified that Espinoza was unfit for trial because he was suffering from a depressive neurosis that prevented him from cooperating with his attorney. Espinoza mumbled unintelligibly throughout this hearing. At the conclusion of the hearing, the state trial judge found Espinoza fit for trial and able to cooperate with his attorney.

Espinoza then moved to suppress his confession. The motion asserted that Espinoza had a Fifth Amendment and a Sixth Amendment right to counsel at the interrogation and that he had not waived these rights knowingly or voluntarily. Specifically, Espinoza claimed that he had not comprehended the *Miranda* warnings; that his psychological disabilities had prevented him from being able to voluntarily relinquish his rights; and that the police had coerced him to confess by placing him in a chair, putting wires on his head, and simulating an electrocution. The trial judge denied the motion, finding that Espinoza had understood what occurred at the interrogation and had confessed voluntarily.

The ensuing trial lasted less than one hour. Espinoza's confession was the state's principal evidence. The confession was buttressed by the tests on the gun that the police found in Espinoza's possession. The state introduced no additional testimony. At the conclusion of the trial, the court found Espinoza guilty.

The trial judge denied the state's request to sentence Espinoza to death because Espinoza's possible psychological problems, and his use of alcohol and narcotics, were mitigating circumstances. Instead, the court imposed the maximum sentence of forty years.

After exhausting his state remedies, Espinoza filed a petition for a writ of habeas corpus, under 28 U.S.C. § 2254, in federal district court. The court granted Espinoza's petition, holding that he had a Fifth Amendment and a Sixth Amendment right to be assisted by counsel at the police interrogation. The court concluded that Espinoza's very limited education, his extensive alcohol and drug use, his preference for speaking Spanish, the short period of time between his being informed that he was a suspect and his confession, and his mental condition at the time of the interrogation, indicated that he had not knowingly and voluntarily waived his right to counsel before he was interrogated by the assistant state's attorney. The court therefore concluded that Espinoza's

confession should have been suppressed. We affirm the decision of the district court but on substantially different grounds.

II.

The Fifth Amendment and the Sixth Amendment each provide a separate right to counsel in a criminal case. The Fifth Amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. Although the amendment itself does not speak of the right to counsel, the Supreme Court held in *Miranda v. Arizona*, 384 U.S. 436 (1966), that it provides "an individual held for interrogation . . . the right to consult with a lawyer and to have the lawyer with him during interrogation," *id.* at 471. In addition, the Sixth Amendment guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence," U.S. Const. Amend. VI, expressly provides a right to counsel.

In the ordinary criminal prosecution, the defendant invokes his or her Fifth Amendment and Sixth Amendment rights to counsel sequentially. The defendant first invokes the Fifth Amendment right to counsel by requesting counsel, either at the time he or she is taken into custody or at a later interrogation conducted while the individual is still in custody. Subsequently, once the state has committed itself to prosecute, the defendant invokes his or her Sixth Amendment right to be represented by counsel at a procedure, such as an arraignment, that constitutes a "critical stage of the prosecution," *United States v. Wade*, 388 U.S. 218, 237 (1967).

In this case, the defendant did not invoke his rights to counsel in the usual sequence. From the time Espinoza was taken into custody on the weapons charge, until his arraignment on that charge six days later, he did not invoke his Fifth Amendment right to counsel. Espinoza's first and only invocation of his right to counsel occurred at his arraignment on the weapons charge, where he clear-

ly invoked his Sixth Amendment right to counsel in that prosecution by accepting representation. *See Brewer v. Williams*, 430 U.S. 387, 404 (1977). After invoking that right, and while still in police custody, Espinoza became a suspect in a murder case. At that point, the police initiated an interrogation of Espinoza concerning the murder.

This case requires us to resolve four questions. We must first determine whether Espinoza had either a Fifth Amendment or a Sixth Amendment right to counsel at the murder interrogation. If he did, we must next establish whether his actions at his arraignment on the weapons charge constituted an invocation of either of those rights. If Espinoza invoked either right, we must resolve whether that invocation remained in effect at the subsequent interrogation. If it did, then we must determine whether Espinoza waived his right to counsel at the interrogation. If we find for Espinoza on each question, then we must conclude that the state trial court should have suppressed Espinoza's confession, and we must affirm the district court's decision to grant his petition.

III.

The district court concluded that Espinoza had a Sixth Amendment right to counsel at the interrogation regarding the murder charge. We do not agree. The Sixth Amendment right to counsel attaches only when the state begins to prosecute an individual. Because the state had not begun to prosecute Espinoza for the Foy murder at the time he confessed, we conclude that he had no Sixth Amendment right to counsel in this case. We need not, therefore, reach the questions of whether Espinoza's actions at his arraignment on the weapons charge constituted an invocation of his Sixth Amendment right in the murder case, the duration of any such invocation, or whether he waived his Sixth Amendment right at the interrogation.

We recently considered whether an individual in police custody who has a Sixth Amendment right to counsel as the accused in one criminal prosecution has a Sixth Amendment right to counsel in a second case in which he or she is a suspect. In *United States ex rel. Hall v. Lane*, 804 F.2d 79 (7th Cir. 1986), the petitioner, Anthony Hall, was arrested and arraigned on charges of attempted robbery and unlawful restraint. While Hall was in jail awaiting trial on these charges, he was required to participate, without counsel, in a line-up as a suspect in an unrelated armed robbery and attempted rape case. Hall was convicted on the latter charges at a trial in which the eyewitness identification made at the line-up was a key piece of evidence. He later petitioned for a writ of habeas corpus, claiming that the line-up evidence was inadmissible because he had been denied his Sixth Amendment right to counsel.

We rejected Hall's claim that he had a Sixth Amendment right to counsel. We explained that the Sixth Amendment "right to counsel attaches only when a defendant proves that, *at the time of the procedure in question*, the government had crossed the constitutionally significant divide from fact-finder to adversary." *Id.* at 82 (emphasis added). We further explained that "the fact that [the petitioner] had already been indicted, and was in jail awaiting trial for another charge," *id.* at 83, did not itself demonstrate that the state had begun the prosecution in the second case. We then considered the specific facts of the case. We found that "[a]t the time of the line-up, Anthony Hall was still a genuine suspect. The state was seeking to determine whether to prosecute him; it had not yet begun to do so." *Id.* As a result, we concluded that, at the time of the line-up, Hall had no Sixth Amendment right to counsel and that the trial court did not err in admitting evidence from the line-up at his trial. *Id.*

Our decision in *Hall* is controlling. At the time of the police investigation, Espinoza was still only a suspect in the investigation of the Foy murder. He therefore had

no Sixth Amendment right to invoke. *See also Maine v. Moulton*, 106 S.Ct. 477, 490 n.16 (1985) (dictum) (Even if the state has begun to prosecute an individual on one charge, subsequent "incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at the trial of those offenses.").

The district court believed that Espinoza's Sixth Amendment right had vested in the murder case because that case was "related to" the weapons prosecution. The court also held that, even if the cases were unrelated, the Sixth Amendment right applied to the murder charge because the murder occurred before Espinoza was arraigned on the weapons charge. We reject both of these conclusions.

We need not speculate as to when, if ever, two crimes may be so closely "related" that once the state has begun the prosecution for one of them, it must be deemed to have begun the prosecution in the other. It is enough to say that in this case the crimes are so unrelated as to render any such theory inapplicable.[1] *Cf. United States v. Chu*, 779 F.2d 356 (7th Cir. 1985) (An indictment for drug offenses did not trigger the accused's Sixth Amendment right to counsel in a related tax evasion investigation.).

We also find it irrelevant that the police were interrogating Espinoza for a crime he allegedly committed before he was arraigned for the weapons offense. The district court relied on *United States v. Moschiano*, 695 F.2d 236 (7th Cir. 1982), *cert. denied*, 464 U.S. 381 (1983), for the

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[1] The only common thread linking the weapons and murder cases is the weapon involved. The two offenses involved different victims on different dates. There is no claim that they were part of any pattern or plan. Although Espinoza's arrest on the weapons charge did provide the police with evidence—which they might not otherwise have obtained—that led to his arrest for the Foy murder, this fortuity does not change the fact that the weapons offense and the murder were, in every constitutionally significant aspect, separate crimes.

proposition that, under the Sixth Amendment, all "post-indictment statements constituting admissions of past wrongdoing" are inadmissible unless the accused is given the right to counsel. *United States ex rel. Espinoza v. Fairman*, No. 84 C 7603 at 11 (N.D. Ill. Mar. 12, 1985) (memorandum opinion) (*quoting Moschiano*, 695 F.2d at 241-42). However, in *Moschiano* we were referring only to post-indictment statements concerning the *specific crime* for which the accused had been indicted. We cannot see why a suspect, who would otherwise have no Sixth Amendment right to counsel, is entitled to that right simply because he has been charged with committing another crime.[2] We found no such entitlement in *Hall*, *supra*, where the petitioner was also under investigation for a crime that he committed before he was arraigned on other charges.

IV.

Although Espinoza had no Sixth Amendment right to counsel in the murder case at the time of the police interrogation, it is clear that, as a suspect in police custody, he did have a Fifth Amendment right to be assisted by an attorney at the interrogation. *Miranda*, 384 U.S. at 469-74. However, Espinoza did not invoke his Fifth Amendment right at the interrogation. The only time at which he invoked his constitutional right to counsel was at his arraignment on the weapons charge, which occurred prior to the murder interrogation. We must therefore determine whether Espinoza's invocation of his right to counsel at his arraignment constituted an invocation of

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[2] We also reject Espinoza's claim that, by interrogating him outside the presence of the attorney who represented him at his arraignment, the state violated his Sixth Amendment right to counsel by interfering with his professional relationship with that attorney. As we stated in *Hall*, " 'the Sixth Amendment's intended function is not to wrap a protective cloak around the attorney-client relationship. . . .' " *Hall*, 804 F.2d at 83 n.5 (*quoting Moran v. Burbine*, 106 S.Ct. at 1146).

his Fifth Amendment right. If it did, we must next decide whether Espinoza's Fifth Amendment invocation remained in effect at the subsequent police interrogation on the murder charge. If so, we must resolve whether Espinoza waived his Fifth Amendment right to counsel at the interrogation.

We conclude that Espinoza invoked his Fifth Amendment right to counsel; that this invocation remained in effect because the custodial interrogation occurred while he remained in continuous police custody; and that because the state initiated the interrogation, Espinoza was incapable of waiving his right to counsel. We therefore conclude that the state violated Espinoza's Fifth Amendment right to counsel and that, as a result, his confession was inadmissible.

A.

We must first consider whether Espinoza invoked his Fifth Amendment right to counsel. The state argues that he did not. Rather, the state contends, Espinoza's invocation of the right to counsel at his arraignment on the weapons charge was limited to his Sixth Amendment right as the accused in that prosecution. We are unable to accept so narrow an interpretation of Espinoza's invocation of his constitutional rights.

In *Michigan v. Jackson*, 106 S.Ct. 1404 (1986), the Supreme Court set out the approach to be employed in assessing the scope of an individual's invocation of his or her constitutional right to counsel. The defendants in *Jackson* were arrested for murder. At their arraignments, they asked the court to appoint counsel. *Id.* at 1406. The state subsequently interrogated the defendants without their attorneys. The defendants, who were later convicted, appealed, claiming that the state had violated their Sixth Amendment rights by failing to honor their request for counsel.

Much like the state in this case, the state in *Jackson* argued that it had not violated the defendants' rights to counsel because the defendants had made only limited invocations of their rights. Specifically, the state argued that the defendants had only requested to have counsel present at their arraignments and that the Court should not construe these requests as invocations of their rights to counsel at subsequent custodial interrogations. *Id.* at 1409. The Supreme Court firmly rejected the state's argument, holding that it was obligated "to give a broad, rather than a narrow, interpretation to a defendant's request for counsel," *id.*, and that it would therefore presume that the defendants had invoked the full extent of their Sixth Amendment rights, *id.*

Although the *Jackson* Court was asked only to resolve whether the defendants had invoked their Sixth Amendment rights to counsel, *see id.* at 1408 n.4, the obligation "to give a broad, rather than a narrow, interpretation," *id.* at 1409, to an invocation of the right to counsel is not limited to the Sixth Amendment context. Rather, the Court's interpretation was simply an application of its "standard for assessing waivers of constitutional rights." *Id.* The Court has recently reaffirmed that the same interpretative approach is to be used in assessing invocations of the Fifth Amendment right to counsel. *See Connecticut v. Barrett*, 107 S.Ct. 828, 832 (1987) (*quoting Jackson*).[3] Under this approach, a court must presume that an individual has invoked the full extent of his or her constitutional right to counsel. In order to rebut this presumption, "the state . . . has the burden of establishing a valid waiver." *Jackson*, 106 S.Ct. at 1409.

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[3] Even though the text of the Fifth Amendment does not provide a right to counsel, *Barrett*, 107 S.Ct. at 831-32, the Supreme Court has consistently recognized the essential role that an attorney plays in ensuring that the state does not coerce individuals into waiving the right not to incriminate themselves. *See id.*; *Miranda*, 486 U.S. at 469-70. Because of the importance of counsel in protecting the textual right, waivers of the right to counsel are to be interpreted in the same manner as waivers of the textual right.

Applying the *Jackson* approach, we must accept, absent evidence to the contrary, that individuals who invoke their right to counsel at their arraignment are invoking both their Sixth Amendment and their Fifth Amendment rights. The *Jackson* Court specifically observed that an individual who has been arraigned has both a Sixth Amendment and a Fifth Amendment right to counsel at a "post-arraignment custodial interrogation." *Id.* at 1407. The Court also observed that "an accused [who] requests an attorney [at arraignment] . . . does not know which constitutional right he is invoking." *Id.* at 1409-10 n.7 (*quoting Michigan v. Jackson*, 421 Mich. 39, 63-64, 365 N.W.2d 56, 67 (1984)). Because an individual who does not understand his or her rights cannot validly waive them, *see Moran v. Burbine*, 106 S.Ct. at 1141, we are required to presume that an individual who requests counsel at his or her arraignment is asserting both a Sixth Amendment and a Fifth Amendment right even if the individual does not "articulate exactly why or for what purposes he is seeking counsel," *Jackson*, 106 S.Ct. at 1409 n.7 (*quoting Michigan v. Jackson*, 421 Mich. at 63-64, 365 N.W.2d at 67).

In this case, as in *Jackson*, the state has presented no evidence indicating that Espinoza intended to limit his invocation of the right to counsel. Applying the principles set forth in *Jackson*, we must conclude that Espinoza's unqualified acceptance of counsel at his arraignment was an invocation of his Fifth Amendment right,[4] rather than a waiver of it.[5]

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[4] In *Jackson*, the defendant specifically requested counsel. *Id.* at 1406. Here, in contrast, the petitioner accepted counsel at his arraignment. This distinction, however, is not relevant. The *Jackson* Court took pains to note that, in construing the scope of an individual's request for counsel, a defendant need not specifically request counsel. 106 S.Ct. at 1409 n.6 (*citing Brewer v. Williams*, 430 U.S. 387, 404 (1977)).

[5] We are aware of only three cases that have ever considered whether individuals who invoke the right to counsel at their ar-

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The Supreme Court's decision in *Miranda* also requires us to find that Espinoza invoked his Fifth Amendment right to counsel. In *Miranda*, the Court held that if a suspect "indicates *in any manner at any stage of the process* that he wishes to consult with any attorney before speaking," *Miranda*, 384 U.S. at 444-45 (emphasis added), he has invoked his Fifth Amendment right to counsel. The invocation need not be "clear and unequivocal." *United States ex rel. Riley v. Frazen*, 653 F.2d 1153, 1159 (7th Cir.) (per curiam), *cert. denied*, 454 U.S. 1067 (1981). Rather, a court must find that an individual has invoked the right to counsel if his or her words or actions "rea-

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[5] *continued*
raignments are invoking both their Sixth and Fifth Amendment rights. *See Collins v. Frances*, 728 F.2d 1322 (11th Cir.) (per curiam), *cert. denied*, 469 U.S. 963 (1984), *reh'g denied*, 469 U.S. 1143 (1985); *Jordan v. Watkins*, 681 F.2d 1067 (5th Cir.), *reh'g denied sub. nom. Jordan v. Thigpen*, 688 F.2d 395 (1982); *Blasingane v. Estelle*, 604 F.2d 893 (5th Cir. 1979). In each case, the court held that the petitioner had invoked only his Sixth Amendment right.

This case is factually distinguishable from *Collins*, *Jordan*, and *Blasingane*. In each of those cases, the court relied on evidence that, in its view, indicated that at the time of his invocation the petitioner was seeking to be assisted in preparing his trial defense (a Sixth Amendment right) and was not seeking to be shielded from state-coerced self-incrimination (a Fifth Amendment right). This evidence included the fact that each petitioner had confessed to the crime prior to his invocation of the right to counsel at his arraignment on that crime. In this case, in contrast, there is absolutely no evidence that Espinoza intended to limit his invocation.

We also decline to follow *Collins*, *Jordan*, and *Blasingane* because the Supreme Court's decision in *Jackson* suggests that they may no longer be good law. *Jackson* held that once an accused has invoked his or her Sixth Amendment right to counsel concerning a crime, the police cannot initiate an interview of the accused concerning that crime. *Jackson*, 106 S.Ct. at 1411. In each of these cases, however, after the petitioner invoked his Sixth Amendment right to counsel, the police initiated an interview about that crime.

sonably may be so construed." *Id.*; *see, e.g., Smith v. Illinois*, 469 U.S. 91 (1984) (per curiam) (defendant's statement, immediately after a police officer advised him of his right to counsel, that "Uh, yeah, I'd like to do that" held to invoke the right to counsel); *United States v. Porter*, 764 F.2d 1, 6-7 (1st Cir.), *reh'g denied*, 776 F.2d 370 (1985) (defendant's unsuccessful effort to contact his lawyer by telephone held to invoke the right to counsel); *United States v. Cherry*, 733 F.2d 1124 (5th Cir. 1984) (defendant's statement that "[m]aybe I should speak to an attorney" held to invoke the right to counsel); *McCree v. Housewright*, 689 F.2d 797, 801 (8th Cir. 1982), *cert. denied*, 460 U.S. 1088 (1983) (defendant's statement that his brother "told me he th[inks] I need[ ] a lawyer" held to invoke the right to counsel). In this case, Espinoza's actions at his arraignment indicated that he wanted an attorney to act as his intermediary with the state. Under *Miranda* we are compelled to give effect to his intention.

B.

Having concluded that Espinoza invoked his Fifth Amendment right to counsel at his arraignment on the weapons charge, we must next determine whether that invocation remained in effect at the subsequent questioning concerning the Foy murder. We conclude that it did.

1. **The duration of the invocation**

In the ordinary case, once the state has begun to prosecute an individual, attention is focused on the Sixth Amendment right to counsel. This is because the Sixth Amendment applies to aspects of a criminal prosecution not covered by the Fifth Amendment, such as a line-up, *see United States v. Wade*, 388 U.S. 218, 221-23 (1967). However, at the time the state initiates the prosecution, the Fifth Amendment right does not vanish. Rather, it continues to provide a right to counsel at any interroga-

tion that occurs during the duration of the time that the individual remains in police custody. *See Jackson*, 106 S.Ct. at 1407 (Individuals have both a Sixth Amendment and a Fifth Amendment right to counsel at "post-arraignment, custodial interrogations.").

There are strong parallels between the duration of an individual's Fifth Amendment and Sixth Amendment right to counsel. The Sixth Amendment right vests when an individual "become[s] the accused." *Escobedo v. Illinois*, 378 U.S. 478, 485 (1964). From that point on the accused is entitled to have an attorney present at all "critical stages of the prosecution." *United States v. Wade*, 388 U.S. at 237 (1967). This right continues for as long as the individual remains "the accused." That is, until the individual is either convicted or freed by reason of acquittal or dismissal of the charges.

In a similar manner, the Fifth Amendment right to counsel vests "when an individual is taken into custody." *Miranda*, 384 U.S. at 478; *United States v. Zazzara*, 626 F.2d 135, 137 (9th Cir. 1980). It is at this moment that the potential for "governmental coercion" becomes significant. *See Colorado v. Connelly*, 107 S.Ct. 515, 519-24 (1986). From that point on, the suspect has "the right to have counsel present at *any* custodial interrogation." *Edwards*, 451 U.S. at 485-86 (emphasis added). Just as the Sixth Amendment right continues for as long as the individual is "the accused," the Fifth Amendment right continues for as long as the individual is "in custody." The right ends only when the heightened potential for state-coerced self-incrimination ends—upon the release of the individual from police custody. *See United States v. Geittman*, 733 F.2d 1419, 1429 (10th Cir. 1984) (suspect's Fifth Amendment right to counsel ended when he was released on bond); *United States v. Skinner*, 667 F.2d 1306, 1309 (9th Cir. 1982), *cert. denied*, 463 U.S. 1229 (1983) (suspect's invocation of his Fifth Amendment right to counsel did not bar police-initiated custodial interrogation where sus-

pect released and arrested the next day because he "was not in continuous custody").[6]

2. The scope of the invocation

Unlike the Sixth Amendment right to counsel, which is limited to the specific crimes for which the state has begun the prosecution, *supra*, the Fifth Amendment right to counsel extends to any crime about which an individual is questioned while in continuous custody. The difference between the scope of the two rights reflects their differing purposes. The "core purpose" of the Sixth Amendment right to counsel is to insure a fair trial. *United States v. Gouveia*, 467 U.S. 180, 188-89 (1984). In order to insure a fair trial, an accused requires counsel only when the government is investigating him or her concerning the specific crimes for which he or she is being prosecuted. In contrast, "[t]he sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion." *Connelly v. Colorado*, 107 S.Ct. at 523. The heightened possibility of state "overreaching," *id.*, exists any time the police or prosecutors question suspects in police custody. Therefore, the Fifth Amendment right to counsel must extend to custodial interrogation concerning any crime.

Because the Fifth Amendment right extends to any interrogation conducted in police custody, if an individual invokes the right to counsel during a proceeding that concerns one crime, the invocation continues to apply if he or she is later interrogated about a second crime.[7] If it

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[6] Because Espinoza was never released from the physical custody of the police, we need not decide the issue of how long the accused must be released from custody to find a break in continuous custody.

[7] This court's opinion in *White v. Finkbeiner*, 687 F.2d 885 (7th Cir. 1982) (*White II*) supports this conclusion. Although the Supreme Court vacated our decision because we applied *Edwards* retroactively, *see Fairman v. White*, 465 U.S. 1075 (1982), there

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were otherwise, the police would be obligated to administer new *Miranda* warnings each time they questioned a suspect in continuous custody about a different crime. The Supreme Court has made clear that the police are not constrained to do so. *See Colorado v. Spring*, 107 S.Ct. 851 (1987) (no Fifth Amendment violation where a suspect was arrested on a weapons charge, waived his right to counsel, answered questions regarding that offense, and later in the interrogation was questioned about a murder).

3. **Espinoza's invocation**

By accepting counsel at his arraignment on the weapons charge, Espinoza invoked his Fifth Amendment right to counsel. This invocation entitled Espinoza to be assisted by counsel at any interrogation, concerning any crime, that the police or prosecutors conducted while he remained in continuous physical custody. The interview conducted by the assistant state's attorney regarding the Foy murder occurred while Espinoza remained in continuous physical custody. It clearly constituted an interrogation. *See Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). Espinoza, therefore, had the right to be assisted by counsel at that interrogation.

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[7] *continued*
is no reason to conclude that the Court rejected our underlying reasoning. Therefore, *White II*'s analysis remains persuasive. In *White*, the defendant was arrested for an offense unrelated to the murder for which he was eventually convicted. *White v. Finkbeiner*, 611 F.2d 186 (7th Cir. 1979) (*White I*). He invoked his right to counsel when given his *Miranda* warnings. The police officer who gave defendant his warnings never told any other officer of this invocation. *Id.* at 189. Subsequently, after another *Miranda* warning, the defendant was questioned about the unrelated murder by a different officer, and confessed. *Id.* We found that the defendant's earlier invocation continued to apply at the time of the later interrogation. *White II*, 687 F.2d at 887-88.

C.

Although Espinoza invoked his Fifth Amendment right to counsel, and was therefore entitled to be represented by counsel at the police interrogation, the possibility remains that he may have waived this right. We conclude, however, that because the state initiated the interrogation, Espinoza was incapable of waiving his previously invoked right to counsel.

In *Miranda*, the Supreme Court held that "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Miranda*, 384 U.S. at 474. However, *Miranda* left open the possibility that the police could request individuals who had invoked their right to counsel to waive this right. *Cf. Michigan v. Mosley*, 423 U.S. 96 (1975) (*Miranda* permits the police to request individuals who have invoked their Fifth Amendment right to *silence* to waive that right). The Court resolved this question in *Edwards v. Arizona*, 451 U.S. 477 (1981), holding that an accused who has "expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-85.

The *Edwards* Court further considered the situation in which the state impermissibly initiates an interrogation after an individual has invoked the Fifth Amendment right to counsel. The Court held that, where the state acts in this matter, it may not establish that the suspect waived the right to counsel merely by showing only that the suspect "responded to further police-initiated custodial interrogation even if he ha[d] been advised of his rights." *Id.* at 484. Rather, when the state impermissibly initiates an interrogation, "any waiver of the defendant's right to counsel [at] that police-initiated interrogation is invalid." *Michigan v. Jackson*, 106 S.Ct. at 1411.

The state suggests that even if Espinoza did invoke his Fifth Amendment right to counsel, the rules laid down in *Edwards* do not apply in this case because Espinoza invoked his Fifth Amendment right at his arraignment rather than, as in *Edwards*, after the police had begun the interrogation. We do not see how this changes the analysis. Once an individual is taken into custody, he or she may request to have an attorney present at any interrogation. A suspect may make this request "at any stage of the process," *Miranda*, 384 U.S. at 444-45. The instant a suspect does so, the prophylactic rules set down in *Edwards* come immediately into operation. They apply for as long as the underlying right applies.

Because Espinoza invoked his Fifth Amendment right to counsel at his arraignment, the state's attorney was barred, under *Edwards*,[8] from initiating any interrogation while Espinoza remained in continuous custody. The state concedes that it initiated the interrogation of Espinoza regarding the Foy murder. Therefore, Espinoza was constitutionally incapable of waiving his right to counsel. By interrogating Espinoza about the murder in the absence of his lawyer, the police violated Espinoza's Fifth Amendment right to counsel.

V.

The State of Illinois violated Espinoza's Fifth Amendment right to counsel by interrogating him without his lawyer. Therefore, the trial court should have granted Espinoza's motion to suppress the confession that he gave at his interrogation. Because Espinoza's confession was admitted into evidence at his trial for the murder of Frank Foy, the district court correctly granted Espinoza's writ of habeas corpus.

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[8] *Edwards* applies to all cases in which defendants were not finally convicted before May 18, 1981, the date on which that case was decided. *Shea v. Louisiana*, 105 S.Ct. 1065 (1985). Espinoza was not convicted until 1983. *Edwards* therefore applies.

The order of the district court is AFFIRMED.

A true Copy:

Teste: _____

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 84 C 7603

UNITED STATES OF AMERICA, ex rel. MIGUEL ESPINOZA,
Petitioner,

v.

WARDEN J.W. FAIRMAN,
Respondent.

MEMORANDUM OPINION

Petitioner Miguel Espinoza filed for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254 ("§ 2254"), challenging his April 14, 1982, conviction for murder and armed robbery. Espinoza, sentenced to 40 years imprisonment for those offenses,[1] claims that he was denied his Fifth and Sixth Amendment rights to assistance of counsel when his confession was admitted into evidence at trial. He raised these issues in a motion to suppress before trial and on his direct appeal; the respondent admits that petitioner has exhausted his state remedies. Answer, p. 1.

The case is before us on respondent's motion for summary judgment. Petitioner moved for appointment of counsel, which we denied because the petition, to which was attached petitioner's appellate brief, sufficiently states the nature of petitioner's claim and sets forth in great detail the legal issues involved. Order of November 29, 1984.

Based upon the trial record, the appellate briefs, petitioner's petition for rehearing in state court, and respon-

dent's memorandum in support of his motion for summary judgment, we deny respondent's motion and grant the writ.

FACTS

On August 29, 1980, Chicago police, responding to a report of a man with a gun, arrived at a tavern, searched petitioner, discovered a gun, and arrested petitioner for unauthorized use of a weapon ("UUW"). Trial Record ("Record") 95-99, 175, 182, 311. Petitioner subsequently was incarcerated in Cook County Jail to await trial. A public defender was appointed to represent petitioner and on some date prior to September 3, 1980, appeared in court on his behalf on this charge. Record 135, 175, 182.

The police Crime Laboratory and Firearms Section analyzed the gun found on petitioner and determined that it had been used to fatally wound Frank Foys, Jr. Record 201-202. On September 3, 1980, petitioner was taken from the jail and brought to see Assistant State's Attorney Brian Collins at the Cook County State's Attorney's office by two police investigators. Collins testified that he did not send for petitioner and did not know how petitioner came to be in his office. Record 123. Collins learned that petitioner had been taken into custory on a charge other than the Foys murder sometime before he began to question petitioner about the murder. Record 121. He did not ask petitioner about his representation on the other charge, and stated that he did not know that petitioner was represented by a public defender. Record 121.

Collins testified that he gave petitioner his *Miranda* warnings and that petitioner orally waived his rights. Record 113-14. Collins then began to question petitioner about the murder. This interrogation was carried out in English, and Collins stated that petitioner spoke English "like a native." Record 124. After 15 to 20 minutes of questioning, Collins sent for a court reporter. After the court reported arrived, Collins again advised petitioner of his *Miranda* rights. Record 117. Again in English, Collins

questioned petitioner. Petitioner confessed to the Foys murder. The court reporter typed his confession, and petitioner was given the opportunity to read and sign each page. Record 131. Petitioner signed the confession. Record 117.

The next morning a complaint was filed against petitioner based upon his confession. The UUW charge was dropped. On October 21, 1980, the judge assigned to the murder case ordered a mental fitness examination for petitioner. A second and a third examination were also ordered in January and February 1981. Based upon the testimony of Dr. Albert Sipes, a psychiatrist, and the report of another psychiatrist, Dr. Gilbert Bogan, who had examined petitioner, petitioner was found unfit to stand trial and was committed to the Department of Mental Health. Record 1-18, 296. Dr. Sipes testified that petitioner was suffering from dysthymic disorder, a depressive neurosis which rendered him unable to cooperate with his attorney. Record 7, 59, 72. Dysthymic disorder is a temporary condition, brought on by situational stress, which prevents the subject from caring about his situation. Petitioner had apparently attempted suicide while in jail. Record 4-5.

While committed to a mental health facility following the finding of unfitness, petitioner received anti-depression medication. Record 42. Dr. Sipes examined petitioner again on December 15, 1981, and found him still not mentally fit for trial. Record 305.

On March 3, 1982, a full hearing was held regarding petitioner's mental fitness. Dr. Gerson Kaplan, a psychiatrist, testified that he spoke with petitioner in English, that petitioner had no difficulty speaking English, that he had given petitioner an electroencephalogram which showed no abnormalities, and that petitioner was not suffering from any mental disorder. Record 25-36, 40-41. Reports from the facility where petitioner was committed were mixed. Record 37-38. Dr. Kaplan interpreted these reports to suggest that petitioner was pretending to be mentally ill. Record 40. Dr. Sipes testified that in his opinion, peti-

tioner was still unable to cooperate with his attorney and was unfit for trial. Record 61. In Dr. Sipes' view, petitioner's depression still prevented him from caring what happened to him; petitioner would "sit there and do what he is told, but that is all that he can do." Record 72. During his hearing, petitioner abruptly left the courtroom and returned, and mumbled unintelligibly. Record 65, 81.

Based upon this evidence, the judge found petitioner fit for trial and able to cooperate with his attorneys. Record 90.

A hearing on petitioner's motion to suppress his confession was then held. Collins testified as to the circumstances of the interrogation, *see supra*, and petitioner, through a Spanish interpreter, stated that he did not understand English very well and had not understood much of what had transpired with Collins. Petitioner had received a second grade education in Mexico, and had a substantial history of drug and alcohol abuse. Record 139-45. His arrest record indicated many arrests for drunk driving and possession of dangerous drugs. Record 311. Petitioner also claimed that he had been hospitalized for "mental damage" following a car accident, but no hospital records were offered. Record 178.

The trial judge denied the motion to suppress, making several findings of fact. He found no language barrier: "while he may feel more comfortable with Spanish . . . he did, in fact understand all that was done." Record 176. The court also found that the government initiated interrogation (Record 175), petitioner was "duly advised of his *Miranda* warnings" (Record 184), and concluded that "in light of all the attendant circumstances [petitioner] knowingly and intelligently, freely and voluntarily gave the statement in question in this cause." Record 183.

Petitioner was then convicted of the murder after a stipulated bench trial in which the confession was the principal state's evidence. An interpreter was provided for petitioner at trial (Record 186), and upon the conclusion of evidence and sentencing, petitioner, over his counsel's

objection, gave a rambling statement in Spanish. He remarked upon "certain mental problems" he had, his relationship with God, requested that he be given the death penalty and that his body be given an autopsy. Record 223. The trial judge declined to sentence petitioner to death. Record 223.

The Illinois appellate court affirmed the denial of the motion to suppress the confession, and held that the trial court's finding of voluntary waiver of counsel was supported by the manifest weight of the evidence because: (1) petitioner understood English; (2) petitioner was twice advised of his right to assistance of counsel; (3) the state introduced evidence that petitioner did not suffer from a serious mental illness; and (4) petitioner made no request for counsel. *People v. Espinoza*, No. 82-1080, slip op. at 5 (1st Dist. Ill. App. Ct. Aug. 31, 1983).

DISCUSSION

We deny respondent's motion for summary judgment and grant petitioner's writ for habeas corpus because the facts in the record[2] indicate that the state violated petitioner's Fifth Amendment right to counsel, as delineated in *Edwards v. Arizona*, 451 U.S. 477 (1981). In addition, we find that because petitioner's Sixth Amendment right to counsel had attached at the time he was questioned, and petitioner did not validly waive that right, the state violated petitioner's Sixth Amendment right as well.[3]

Fifth Amendment Right to Counsel

In *Edwards*, the Supreme Court held that once a defendant has invoked his right to counsel, the government must cease all interrogation. Defendant initiation is the only method by which a defendant can validly waive his Fifth Amendment right to counsel. *Id.* at 484-85. This rule is "rigid" and clear-cut, in order to avoid any possibility that police will attempt to badger a suspect into confessing. *Smith v. Illinois*, ____ U.S. ____, 105 S.Ct. 490, 492 (1984).

Here, petitioner obviously at some point prior to interrogation on the murder charge invoked his right to counsel, because a public defender was appointed for him and appeared at his arraignment on the UUW charge. Respondent has not argued that petitioner initiated the conversation, and the trial court specifically held that interrogation was initiated by the state. Record 175. Therefore, following *Edwards*, the facts here demonstrate a violation of petitioner's Fifth Amendment right to counsel.

The trial and appellate courts found that *Edwards* was inapplicable, apparently because Collins questioned petitioner about a murder, while the public defender had been appointed to defend petitioner on the UUW charge:

> Defendant fails to cite any authority to support his assertion that the appointment of counsel to represent him in a separate prosecution is the equivalent of an invocation of his right to counsel in the instant case. We therefore believe that the trial court's finding of voluntary waiver of counsel was supported by manifest weight of the evidence.

People v. Espinoza, slip op. at 5; *see* Record 175.

Three cases from the Seventh Circuit and this district clearly indicate that, under *Edwards*, once a suspect invokes his right to counsel on one charge, the government may not initiate interrogation on any other charge. *White v. Finkbeiner (II)*, 687 F.2d 885 (7th Cir. 1982), *vacated sub nom Fairman v. White*, ____ U.S. ____, 104 S.Ct. 1433 (1984), *on remand*, ____ F.2d ____, No. 79-1563 (7th Cir. Jan. 15, 1985); *United States ex rel. Karr v. Wolff*, 556 F. Supp. 760 (N.D. Ill. 1983), *vacated*, 732 F.2d 615 (7th Cir. 1984); and *United States ex rel. Kines v. Geer*, 527 F. Supp. 307 (N.D. Ill. 1981).[4]

In *White*, the defendant was arrested for an offense unrelated to the murder for which he was eventually convicted. *White v. Finkbeiner (I)*, 611 F.2d 186 (7th Cir. 1979).[5] He invoked his right to counsel when given his *Miranda* warnings. The police officer who gave defendant his warnings never told any other officer of this invoca-

tion. *Id.* at 189. Subsequently, after another *Miranda* warning, defendant was questioned about the unrelated murder by a different officer, and confessed. *Id.*

The Seventh Circuit found that the Court's decision in *Edwards* made the confession inadmissible. It was irrelevant under *Edwards* whether or not the officer questioning defendant about the murder knew that defendant had invoked his right to counsel on the unrelated charge: *Edwards* made government initiation of any conversation impermissible. *White (II)*, 687 F.2d at 887 n. 9.

Similarly, in *Karr*, the petitioner was arrested in McHenry County, Illinois, for an offense committed in that county. *Karr*, 556 F. Supp. at 761. Petitioner invoked his right to counsel. Meanwhile, authorities in Lake County, Illinois, learned that police in McHenry were holding petitioner for an offense with a modus operandi similar to a crime being investigated in Lake County. Lake County police officers travelled to McHenry, read petitioner his *Miranda* warnings, and questioned him about the unrelated Lake County offense. Petitioner confessed. The court granted the petition, finding a violation of *Edwards*. The Court stated that "*Edwards* would make it incumbent on the Lake County police to determine whether [petitioner] had invoked his right to counsel and to cut short their interrogation if he had." *Karr*, 556 F. Supp. at 764.

Finally, in *Kimes*, petitioner was arrested for theft. He invoked his right to counsel. A few hours later, police initiated interrogation concerning an unrelated armed robbery, and petitioner confessed. The court granted petitioner's writ, finding *Edwards* controlling, and stated that it was irrelevant that the second interrogation involved an offense unrelated to the first interrogation. *Kimes*, 527 F. Supp. at 309 n. 3.

These decisions make it clear that when a defendant invokes his right to counsel, the government may not initiate interrogation in any charge, however unrelated the subsequent questioning may be to the initial interroga-

tion. Therefore, the state in the instant case should not have attempted to question petitioner about the murder: *Edwards* "would make it incumbent on" Collins to determine whether petitioner had invoked his right to counsel and "to cut short [his] interrogation if he had." *Karr*, 556 F. Supp. at 764.[6] Because the state clearly initiated interrogation after petitioner had invoked his right to counsel, we find that the state violated petitioner's Fifth Amendment rights.

Sixth Amendment Right to Counsel

Moreover, we find that because the UUW charge was related to the murder charge, petitioner's Sixth Amendment right to counsel had attached at the time he was questioned. Because the record does not demonstrate a valid waiver, this right was violated.

The state and trial courts found that petitioner's Sixth Amendment rights had not yet attached at the time he was questioned, because petitioner had not been charged with murder, but only unlawful use of a weapon. Because Sixth Amendment rights attach only after initiation of adversary judicial proceedings, *see Kirby*, 406 U.S. at 690 (1972), the state courts found that at the time of interrogation, petitioner's Sixth Amendment rights had attached only in relation to the UUW charge. *Espinoza*, slip op. at 6. The courts based their decisions on their conclusion that the UUW charge was not related to the murder charge. *Id.* at 8.

We disagree. In *Massiah*, the defendant had been arrested on narcotics charges. While free on bail, he was approached by a federal agent who elicited incriminating statements from him. The government used these statements in the trial against him, which, in addition to the original charges, included new counts derived from the statements. *Massiah*, 377 U.S. at 206, 307 F.2d 62, 78 (2d Cir. 1962). The Supreme Court reversed the defendant's conviction, holding that government solicitation of incriminating statements in the absence of counsel violates

the Sixth Amendment. *Massiah*, 377 U.S. at 206. Thus, even in motion to suppress, the first case to hold solicited statements inadmissible, the statements concerned charges not identical to the original charge against the defendant. *See United States ex rel. Sanders v. Rowe*, 460 F. Supp. 1128, 1139 (N.D. Ill. 1978).

The Illinois Supreme Court found that Sixth Amendment rights did not attach in one case because, unlike *Massiah*, the later charges had not been "procured pursuant to the investigation of the original charges for which adversary proceedings had been initiated." *People v. Martin*, 102 Ill.2d 412, 466 N.E.2d 228, 232 (1984). Here, the murder charge was "procured pursuant" to the UUW charge: by analyzing the gun obtained in the UUW arrest, the state linked petitioner to Foys' murder. The decision to question petitioner regarding the murder grew directly out of the UUW charge.

Moreover, even if the UUW charge were not related to the murder charge, we would still find that petitioner's Sixth Amendment rights had attached, because the interrogation involved wrongdoing committed prior to the UUW arrest. The Seventh Circuit had distinguished solicitation that violates motion to suppress from constitutional solicitation by finding "post-indictment statements constituting admissions of past wrongdoing" are not. *United States v. Moschiano*, 695 F.2d 236, 241-42 (7th Cir. 1982). In *Moschiano*, the court specifically stated, "*Massiah* forbids the use at trial of uncounseled post-indictment statements relating to past wrongdoing." *Id.* at 243. *See also United States v. Merritts*, 537 F.2d 713, 715 n. 4 (7th Cir. 1975) (distinguishing *Massiah* based on *Massiah*'s statements concerning "past wrongdoing," not new criminal acts).

Here, the statements concerning Foy's murder related to past wrongdoung, not an act committed after petitioner had been arraigned in the UUW charge. Therefore, under the Seventh Circuit's interpretation of *Massiah*, the government could not deliberately solicit such statements in

the absence of counsel, and petitioner's Sixth Amendment right to counsel was violated, unless petitioner waived that right.[7]

Respondent argues that even if petitioner's Sixth Amendment rights did attach, petitioner waived that right when he responded to questioning after being given his *Miranda* warnings. We disagree.

In order to demonstrate a waiver of the Sixth Amendment right to counsel, the government must show an intentional relinquishment or abandonment of a known right or privilege. *Brewer v. Williams*, 430 U.S. 387, 404 (1977), *citing Johnson v. Zerbst*, 304 U.S. 458 (1938). The *Zerbst* test places a "heavy" burden on the government, and "courts indulge every reasonable presumption against waiver." *White (I)*, 611 F.2d at 192; *Zerbst*, 304 U.S. at 464. Each waiver must be evaluated on the basis of its own fact situation. *Zerbst*, 304 U.S. at 464; *Robinson v. Percy*, 738 F.2d 214 (7th Cir. 1984). In this case, the government's burden is raised above that found in *Zerbst* because a high burden of proof is imposed to show waiver of counsel where, as here, counsel has already been appointed for the defendant prior to the time that he was questioned. *United States v. Springer*, 460 F.2d 1344 (7th Cir.), *cert. denied*, 409 U.S. 873 (1972).

Applying a heightened *Zerbst* test to the facts of this case, we find that respondent is not entitled to summary judgment, but, to the contrary, the record demonstrates lack of valid waiver, entitling petitioner to a writ.

The facts in the record argue against waiver. *Zerbst* and *Robinson* indicate that a defendant's background and experience are relevant. Elsewhere, the Seventh Circuit also considered background and experience, and, in finding wavier, specifically noted that the defendant had no history of drug use and did have a knowledge of court practice. *United States v. Davis*, 604 F.2d 474 (7th Cir. 1979). Here, petitioner's background indicates little education, a long history of alcohol and drug abuse, and that he was "more comfortable" speaking and understanding Spanish.

Record 176. While he had a long arrest record, none of these arrests involved violent crimes, but were all drug, alcohol and car theft violations. Record 311. Also, *Robinson* noted the fact that a defendant knows he is being charged with the crime about which he is being questioned is an indication of waiver. *Robinson*, 738 F.2d at 222. Here, petitioner was not aware prior to questioning that the state intended to charge him with murder. In *Springer*, the Seventh Circuit also took into account a time interval to reflect before confessing, which did not occur here.

Petitioner's mental state at the time he was questioned is one more factor which cuts against waiver. At one point, he was deemed unfit for trial because he suffered from nervous depression and evinced suicidal tendencies. This type of disorder is triggered by stress, and renders the subject very cooperative and unable to care about his situation. Record 75. Despite a later finding of fitness, we regard the first finding of unfitness as significant because it was made at a point closer in time to the interrogation. Certainly, incarceration in Cook County Jail can be considered a stressful event, likely to trigger depression in a person vulnerable to such a response. Therefore, the evidence tends to support an inference that petitioner was suffering from depression when he was questioned. According to doctors' testimony, if petitioner were depressed when he met Collins, he would have had no concern about himself, and might have agreed with whatever Collins wanted him to say. The two sets of *Miranda* warnings given to petitioner would have had little effect.

Based upon this showing, using a totality of circumstances test with a strict burden of proof on the state, and keeping in mind petitioner's limited education, limited court experience, history of alcohol and drug abuse, and the circumstances under which his confession was taken. with no counsel present and government initiation, we find that petitioner did not voluntarily waive his Sixth Amendment right to counsel.

CONCLUSION

Respondent's motion for summary judgment is denied. Because the facts in the record indicate that, contrary to the rule set out in *Edwards*, the state initiated interrogation in the absence of petitioner's counsel, and that petitioner did not waive his Sixth Amendment right to counsel, we grant the petitioner a writ of habeas corpus. Petitioner is to be discharged from custody unless the state retries him within 120 days. If the state decides to appeal this order, we will entertain a motion to stay issuance of the writ pending appeal.

DATED: March 12, 1985

ENTER: /s/ John F. Grady
United States District Judge

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[1] Espinoza's conviction for armed violence was vacated by the appellate court in light of People v. Donaldson, 91 Ill.2d 164, 435 N.E.2d 477 (1982). People v. Espinoza, No. 82-1080, slip op. (1st Dist., Ill. App. Ct. Aug. 31, 1983).

[2] Pursuant to § 2254, we presume that all of the state court's findings of fact, e.g., that petitioner could understand English, are correct. We do not presume correctness as to the court's legal conclusions, e.g., that petitioner waived his right to counsel. Determinations of waiver are not factual findings, but rather are issues of federal law. *Brewer*, 430 U.S. at 402. Therefore, a state court's finding as to waiver is not binding on this court. United States v. Scott, 501 F. Supp. 53 (N.D. Ill. 1980). The Seventh Circuit in *Robinson* did state in reviewing a state trial and appellate court's finding of waiver that "lower courts' determinations regarding a defendant's waiver are 'entitled to substantial deference,' " *citing* Springer and Sumner v. Mata, 449 U.S. 539, 546 (1981). However,

the court in *Springer* was referring to the federal district court's finding of waiver, and *Sumner* did not involve waiver. Therefore, while we give the state court's determinations great consideration in this case, in light of *Brewer*, we base our legal conclusions on an independent review of the record.

[3] The Fifth Amendment right to counsel attaches when a suspect is subjected to custodial interrogation. Miranda v. Arizona, 384 U.S. 474 (1966). The Sixth Amendment right to counsel attaches when the government deliberately solicits information from a defendant after adversarial proceedings have begun. Kirby v. Illinois, 406 U.S. 682 (1970); Massiah v. United States, 377 U.S. 201 (1964).

[4] *White* and *Karr* were vacated and remanded by the Supreme Court and Seventh Circuit after lower courts found confessions inadmissible under *Edwards*, because the Court held that *Edwards* should not be applied retroactively, Solem v. Stames, ____ U.S. ____, 104 S.Ct. 1338 (1984). Therefore, the remanding courts instructed the lower courts to apply pre-*Edwards* law.

Edwards was decided on May 18, 1981. At that point in time, petitioner had been questioned and charged with murder, but had not yet been tried. The Supreme Court recently has ruled that *Edwards* applies to all cases in which defendants were not finally convicted before the date on which *Edwards* was decided. Shea v. Louisiana, ____ U.S. ____, ____ S.Ct. ____, 53 U.S.L.W. 4173 (U.S. Feb. 20, 1985). Therefore, *Edwards* applies in this case, and the vacated opinions in *White (II)* and *Karr* are indicative of the Seventh Circuit's view of post-*Edwards* law.

[5] *White (I)* was vacated by the Supreme Court in light of *Edwards*, 415 U.S. 1013 (1981).

[6] We note that this case differs from the situation found in *White (II)*, *Karr* and *Kimes* in that in those three cases, the government initiated questioning before the defendant had seen his attorney at all. Here, petitioner did see counsel, at least when he was arraigned on the UUW charge. Therefore, the initiation of questioning occurred after petitioner had conferred with his attorney. *Edwards* states that "an accused . . . is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication." *Edwards*, 451 U.S. at 484-85. Theoretically, respondent could argue that because counsel had been made available to petitioner when he was arraigned on the UUW charge, *Edwards* does not apply, and the state could initiate questioning.

But we do not interpret *Edwards* to permit such initiation. Rather, we believe that the Court meant that after a suspect has invoked his Fifth Amendment right to counsel, the government

may not initiate any questioning unless the suspect's counsel is present at the interrogation. The Fifth Amendment right to counsel means that a suspect "must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." *Miranda*, 384 U.S. at 474. Petitioner invoked this right, including the opportunity to have counsel present at subsequent questioning, when a public defender was appointed for him. Therefore, the government could not bypass petitioner's attorney and initiate questioning in his absence. An interpretation of *Edwards* allowing such conduct would undermine the entire rationale of that decision. As indicated, *supra*, at 6, the Court held as it did in *Edwards* because it feared that police would attempt to badger a suspect into confession. A suspect is vulnerable to such badgering whenever his attorney is not present. *See Miranda*, 384 U.S. at 474. Therefore, we interpret *Edwards* to hold that any discussion must be initiated by the suspect or held with counsel present.

[7] We also find pertinent the remarks made in the dissent in *Martin*:

> While the primary responsibility of the attorney was in the [original] charge, to say that he had only the responsibility of counseling on that charge and that the benefit of counsel to which the client was entitled was also so limited seems dangerously close to making the attorney's appointment here only a formalism.

Martin, 102 Ill.2d at 426; 466 N.E.2d at 235 (Ward, J., dissenting, joined by Goldenhersh and Simon, JJ.) Even if the instant case did not meet the test for relatedness set forth by the majority in *Martin* (which it does), we believe that unless petitioner's public defender is considered his attorney for Sixth Amendment purposes on the murder charge, his appointment would amount to mere formalism.

Third Division—Filed 8-31-83

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

No. 83-706

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

MIGUEL A. ESPINOZA (Impleaded),

Defendant-Appellant.

Appeal from the Circuit Court of Cook County.
Honorable **Fred Suria, Jr.**, *Judge Presiding.*

ORDER DISPOSING OF APPEAL UNDER SUPREME COURT RULE 23

Following a bench trial on stipulated facts, defendant, Miguel A. Espinoza, was convicted of murder (Ill. Rev. Stat. 1981, ch. 38, par. 9-1), armed robbery (Ill. Rev. Stat. 1981, ch. 38, par. 18-2) and armed violence (Ill. Rev. Stat. 1981, ch. 38, par. 33A-2/9-1). He was sentenced to concurrent terms of 40 years for murder, 30 years for armed robbery and 30 years for armed violence. On appeal, defendant contends that the trial court erred in refusing to suppress a confession allegedly obtained in violation of his fifth and sixth amendment right to the assistance of counsel.

At a hearing on the motion to suppress, Officer Anthony Denton testified that on August 29, 1980, he responded

to a radio message about a man with a gun in a tavern. When he reached the tavern, he was met by an unidentified person who indicated that defendant was the man with the gun. Officer Denton conducted a pat-down search of defendant and arrested him upon finding a gun in his pants pocket.

Defendant was taken into custody and charged with the unlawful use of weapons. At some time between August 29 and September 3, he made a court appearance on that charge and was represented by an assistant public defender.

Assistant State's Attorney Brian Collins testified that he interviewed defendant on September 3, 1980, at the Cook County State's Attorney's office located at 26th and California. After having been advised of his *Miranda* rights, defendant gave an oral statement concerning a murder and robbery which occurred on August 24, 1980. Ballistics tests of the gun recovered from defendant on August 29 had shown that it was the same gun used in the murder and armed robbery of Frank Foys, Jr. Upon completion of the oral statement, a court reporter was called and defendant was again advised of his *Miranda* rights. He then gave a written confession admitting that he fatally shot the victim and robbed him of his wallet and watch.

Collins stated that both the oral and written confessions were conducted in English and that defendant spoke English "like a native." He further stated that while in the office defendant read a sports magazine and discussed an article concerning a football player. It was Collins' opinion that defendant was in excellent health at the time. Although he knew defendant was in custody on an unlawful use of weapons charge at the time of the confession, he did not know that an assistant public defender had been appointed to represent him on that charge. Collins did not ask any questions concerning the unlawful use of weapons charge.

Defendant testified, through an interpreter, that he remembered the interview with Collins but that he could not understand some of the questions because he did not speak English very well. He stated that he first came to this country in 1969 and he admitted conversing in English with Drs. Kaplan and Stipes, who examined him to determine his fitness to stand trial.[1]

At the conclusion of the hearing, the court entered specific findings that: (1) defendant had no difficulty speaking or understanding the English language; (2) he was represented by an assistant public defender on a separate, unlawful use of weapons charge; (3) at the time of the confession, he had not yet been charged with the murder and armed robbery of Frank Foys, Jr.; (4) there was no evidence indicating that defendant invoked his right to counsel with respect to the instant charges; and (5) the confession was "knowingly, intelligently, freely and voluntarily" given.

Defendant first contends that his fifth amendment right to the assistance of counsel during custodial interrogation was violated. He argues that the appointment of an assistant public defender to represent him on the unlawful use of weapons charge constituted an invocation of his right to counsel with respect to the instant charges.

The right to the assistance of counsel during custodial interrogation is an adjunct of the fifth amendment privilege against self-incrimination. (*People v. Krueger* (1980), 82 Ill. 2d 305, 412 N.E.2d 537.) If, at any time during a custodial interrogation, an accused expresses his desire to deal with law enforcement officials only through counsel, all questioning must stop until counsel has been made available to him. The only exception to this rule exists where defendant himself initiates further communication with the

[1] Defendant was initially found unfit to stand trial on February 23, 1981, and was committed to the Department of Mental Health. He was subsequently found competent to stand trial on March 3, 1982.

authorities. (*Edwards v. Arizona* (1981), 451 U.S. 477, 68 L. Ed. 2d 378, 101 S. Ct. 1880.) In order to establish valid waiver of the right to counsel, the State must prove, by a preponderance of the evidence, "an intentional relinquishment or abandonment of a known right or privilege." (*People v. Aldridge* (1980), 79 Ill. 2d 87, 92, 402 N.E.2d 176, 179.) Where the State makes a *prima facie* showing that a confession was procured in accordance with constitutional guidelines, the burden of producing evidence that the confession was illegally obtained shifts to the defense, and shifts back to the prosecution only when the defendant has produced such evidence. (*People v. Cozzi* (1981), 93 Ill. App. 3d 94, 416 N.E.2d 1192.) To show that he invoked his right to counsel, the defendant must show that the request for counsel was made by him or on his behalf. *People v. Krueger.*

In the instant cause, the State established that defendant understood English and that he was twice advised of his right to the assistance of counsel. Although defendant claims to have suffered from brain damage, the State introduced evidence that he was in good health and did not suffer from a serious mental illness. As the trial court specifically noted, defendant produced no evidence indicating that he made a request for counsel. Furthermore, defendant fails to cite any authority to support his assertion that the appointment of counsel to represent him in a separate prosecution is the equivalent of an invocation of his right to counsel in the instant cause. We therefore believe that the trial court's finding of a voluntary waiver of counsel was supported by the manifest weight of the evidence.

Defendant next contends that his sixth amendment right to counsel attached when adversary proceedings were initiated on the separate unlawful use of weapons charge. He argues that this right was violated when the authorities questioned him concerning the instant crimes in the absence of counsel.

A defendant's sixth amendment right to the assistance of counsel attaches at or after the initiation of adversary judicial criminal proceedings, whether by way of formal charge, preliminary hearing, indictment, information or arraignment. (*Moore v. Illinois* (1977), 434 U.S. 220, 54 L. Ed. 2d 246, 98 S. Ct. 458.) However, Illinois courts have held that the initiation of adversary proceedings on one charge does not trigger a defendant's sixth amendment right to counsel with respect to an unrelated offense. *People v. Martin* (1979), 80 Ill. App. 3d 281, 399 N.E.2d 265; *People v. Earl* (1979), 78 Ill. App. 3d 188, 397 N.E.2d 97.

In *People v. Martin*, the defendant was arrested on January 16, 1976, and charged with certain offenses. On January 19, 1976, he was questioned about an unrelated burglary, armed robbery and murder. After receiving the *Miranda* warnings, the defendant made a statement and was subsequently charged with those crimes. On appeal, he argued that his sixth amendment right to counsel had been violated. In rejecting that argument, the court noted that although adversary proceedings had begun on the charges for which the defendant was initially arrested, he had not yet been formally charged with the unrelated offenses which formed the basis of the questioning. Therefore, his sixth amendment right to counsel had not yet attached with regard to those offenses.

In *People v. Earl*, the defendant was arrested on December 27, 1976, and charged with the unlawful use of weapons. Counsel was appointed to represent him, and a preliminary hearing was held. On January 13, 1977, the defendant was placed in a lineup and identified as the perpetrator of an armed robbery and aggravated battery which had occurred on December 5, 1976. His attorney was not present at the lineup. The court held that although the defendant's sixth amendment right to counsel had attached in the separate unlawful use of weapons prosecution, it was "evident that in the instant matter adversary criminal proceedings relevant to the armed robbery or aggravated battery offenses had not been initiated against defendant when he took part in the lineup." (*Peo-*

ple v. Earl (1979), 78 Ill. App. 3d 188, 193, 397 N.E.2d 97, 101.) Therefore, his right to counsel had not yet attached with respect to those offenses.

Defendant relies on *United States ex rel. Sanders v. Rowe* (N.D. Ill. 1978), 460 F. Supp. 1128, for the proposition that once adversary proceedings commence on one offense, the right to counsel attaches during any subsequent interrogation even if the questioning pertains to different offenses and is conducted by a different police agency. In *Sanders,* defendant was arrested and charged with armed robbery. Later that day, in the absence of counsel, he confessed to committing two other armed robberies on the same night. In deciding that adversary proceedings for all three offenses commenced with the filing of a complaint on only one, the court specifically noted that the crimes were closely related in time and therefore part of a continuous series of criminal activity. In contrast, the offenses in the instant cause were committed on separate days and clearly not part of a related series of criminal activity. We therefore follow the reasoning set forth in *People v. Martin* and *People v. Earl* in concluding that defendant's sixth amendment right to counsel was not violated.

Defendant also contends that since his convictions for murder and armed violence arose from the same physical act, the conviction for armed violence must be vacated under the authority of *People v. Donaldson* (1982), 91 Ill. 2d 164, 435 N.E.2d 477. We agree with this contention and therefore vacate his conviction for armed violence. The State's request for costs in the amount of $50 under *People v. Nicholls* (1978), 71 Ill. 2d 166, 374 N.E.2d 194 is granted.

Accordingly, the judgment of the circuit court is affirmed in part and reversed in part.

Affirmed in part; reversed in part.

McNAMARA, P.J., McGILLICUDDY and WHITE, J.J.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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NO. 86-1765

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

JAMES W. FAIRMAN, Warden
Joliet Correctional Center,

Petitioner,

vs.

MIGUEL ESPINOZA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

MIGUEL ESPINOZA, the Respondent, respectfully moves the Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 46.1 of this Court, and to file herein his response to the Petition for Writ of Certiorari in the United States Court of Appeals for the Seventh Circuit in single counterpart, without printing same. The typed Brief of Respondent in Opposition is presented herewith for filing.

Leave to proceed in forma pauperis was not sought in any court below.

The United States Court of Appeals for the Seventh Circuit appointed counsel for Respondent under Title 18, United States Code, Section 3006A(d)(6), the Criminal Justice Act of 1964. Therefore, no Affidavit is filed herewith.

Respectfully submitted,

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William H. Wise *
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NO. 86-1765

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I.

Should this Court's decision in Michigan vs. Jackson, 475 U.S. ____, 106 S.Ct. 1404, 89 L.Ed 2d 631 (1986) be applied retroactively to collateral review of final convictions?

II.

Whether a suspect's confession to murder should be suppressed, under Edwards vs. Arizona, 451 U.S. 477 (1981), because it was obtained at a government initiated, custodial interrogation after the suspect had invoked his right to counsel at an arraignment on another charge and had remained in continuous, physical custody from the initial arrest until the interrogation.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Miguel Espinoza, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Seventh Circuit's opinion in this case. That opinion is reported at 813 F.2d 117.

STATEMENT OF THE CASE

On August 29, 1980, Chicago police officers arrested Miguel Espinoza, respondent, on a charge of unauthorized use of weapons. Espinoza awaited trial in Cook County jail from August 29, 1980 until September 3, 1980. During this time, a public defender was appointed to represent Espinoza and appeared on his behalf at his arraignment on the weapons charge.

While Espinoza remained in custody, the police analyzed the gun taken from him at the time of this arrest and concluded that it had been used to kill Frank Foy, Jr. On September 3, 1980, Espinoza was taken by police investigators from jail to the Cook County State's

Attorney's Office for questioning. No attempt was made to contact or notify Espinoza's attorney.

Assistant State's Attorney, Brian Collins, questioned Espinoza regarding the murder. He was aware that Espinoza was in custody on the weapons charge, but he did not ask Espinoza if he had a lawyer.

Collins questioned Espinoza in English. He did not ask Espinoza, a native Mexican, if he could speak English or if he needed an interprete Espinoza responded to Collins' questioning in English. However, his responses consisted primarily of "yes" and "no." Espinoza confessed that he and two of his friends had murdered Frank Foys after only 15 to 20 minutes of questioning.

The next morning a complaint, based on Espinoza's confession, was filed. The State dropped the weapons charge.

Espinoza was not tried for a year and a half. The trial judge initially ordered Espinoza held in jail pending a psychiatric evaluation of his competence to stand trial. While in jail, Espinoza attempted suicide. He was then placed in Chester Mental Health Center where five different mental health professionals examined Espinoza over the ensuing year and a half. Four of the five found Espinoza mentally unfit to stand trial.

On March 3, 1982, a full hearing was held to determine whether Espinoza was capable of standing trial. One psychiatrist testified that he had given Espinoza an electroencepalogram and it showed no abnormalties. Therefore, be believed that Espinoza was pretending to be mentally ill. Another psychiatrist testified that Espinoza was unfit to stand trial because he suffered from a depressive neurosis that prevented him from caring about his well-being and, thus, rendered him unable to cooperate with his attorney. Throughout the hearing, Espinoza mumbled unintelligibly.

At the conclusion of this hearing the State trial judge found Espinoza fit for trial and able to cooperate with his attorney.

Next, Espinoza moved to suppress his confession based on his fifth and sixth amendment right to counsel at the interrogation. In the

motion, Espinoza claimed that he had not understood the Miranda warnings; that mental illness had prevented him from being able to voluntarily waive his rights; and that the police had coerced him into confessing by putting him in a chair, placing wires on his head, and simulating an electrocution.

The trial judge denied the motion and found that Espinoza understood what happened at the interrogation and confessed voluntarily.

The following bench trial lasted less than one hour. Espinoza's confession was the State's principal evidence. The State introduced no additional testimony. Espinoza was found guilty at the end of the trial.

After exhausting all State remedies, Espinoza filed a Petition for Writ of Habeas Corpus in federal district court. The district court granted the petition and held that Espinoza's fifth amendment right to counsel had been violated during the interrogation based on the rule set forth in Edwards vs. Arizona, 451 U.S. 477 (1981). The court also found that Espinoza had a sixth amendment right to counsel which had been violated. The court concluded that Espinoza's limited education, his preference for speaking Spanish, the short period of time between being informed that he was a suspect and his confession, and his mental condition at the time of interrogation, indicated that he had not knowingly and voluntarily waived his sixth amendment right to counsel.

The circuit court affirmed on fifth amendment grounds. The court concluded that, because Espinoza had invoked his fifth amendment right to counsel at his arraignment, the State was barred, under Edwards, from initiating any interrogation while Espinoza remained in continuous custody. Because the State concedes that it initiated the interrogation, the circuit court found that Espinoza was constitutionally incapable of waiving his right to counsel and that the State violated Espinoza's fifth amendment right to counsel.

REASONS A WRIT OF CERTIORARI SHOULD BE DENIED

I.

THIS COURT HAS ALREADY APPLIED MICHIGAN VS. JACKSON, 475 U.S. _____ 106 S.Ct. 1404, 89 L.Ed. 2d 631 (1986), RETROACTIVELY TO THE COLLATERAL REVIEW OF A FINAL CONVICTION.

In Murphy vs. Holland, _____ U.S. _____, 106 S.Ct. 1787, 90 L.Ed. 2d 334 (1986), this Court vacated the judgment of the United States Court of Appeals for the Fourth Circuit and remanded the case for further consideration in light of Michigan vs. Jackson, 475 U.S. _____, 89 L.Ed 2d 631, 106 S.Ct. 1404 (1986). Murphy vs. Holland, 776 F.2d. 470 (4th Cir. 1985), was a collateral review of a final conviction.[1]

Because this Court has already asked the Fourth Circuit to apply Michigan vs. Jackson retroactively in Murphy vs. Holland, the issue of retroactivity should not be "a vital concern for the lower courts." (Pet., p. 7). Therefore, it is unnecessary for this Court to decide the first Question Presented.

II.

PETITIONER'S QUESTION CONCERNING THE RETROACTIVITY OF MICHIGAN VS. JACKSON, 475 U.S. _____ 106 S.Ct. 1404, 89 L.Ed. 2d 631 (1986) WAS NOT RAISED BELOW.

Petitioner and respondent argued this case before the United States Court of Appeals for the Seventh Circuit on April 8, 1986 and the Seventh Circuit decided it on February 25, 1987. This Court decided Michigan vs. Jackson on April 1, 1986, seven days before oral argument but after briefing was completed below.

The Seventh Circuit raised the Michigan vs. Jackson case at oral

[1] On March 6, 1980, Murphy was convicted in the Circuit Court of Braxton County, West Virginia. Murphy exhausted his state remedies and then petitioned the federal district court for habeas corpus relief. The writ was denied on July 31, 1984. He then appealed to the United States Court of Appeals for the Fourth Circuit which rendered the opinion in Murphy vs. Holland, 776 F.2d. 470 (4th Cir., 1985).

argument and asked both petitioner and respondent to discuss its applicability. However, the petitioner did not raise the retroactivity issue at oral argument nor did he seek to brief the court on the issue.

In U.S. vs. Ortiz, 422 U.S., 891, 898 (1975), this Court declined to consider a similiar issue because it was raised for the first time in the petition for certiorari. Likewise, this Court should decline to consider the issue of the retroactivity of Michigan vs. Jackson because it was raised for the first time in the petition for certiorari.

III.

MICHIGAN VS. JACKSON DISTINGUISHES THE DECISION IN THIS CASE FROM CONFLICTING DECISIONS IN OTHER CIRCUITS.

Petitioner claims that the Seventh Circuit decision in this case departed from the decisions of other federal courts because it determined that Espinoza's request for counsel at his arraignment invoked his fifth amendment right to counsel.[2] However, the Seventh Circuit correctly distinguished the decisions in the other circuits because they were decided before Michigan vs. Jackson (App. 12, n.5).

The Seventh Circuit noted that it knew of only three cases that have ever considered whether individuals who invoke the right to counsel at their arraignments are invoking both their fifth and sixth amendment rights. Two of these three cases were decided by the Fifth Circuit before Michigan vs. Jackson. See Jordan vs. Watkins, 681 F.2d 1067 (5th Cir.), reh'g denied sub. nom. Jordan vs. Thigpen, 688 F.2d 395 (1982), and Blasingame vs. Estelle, 604 F.2d 893 (5th Cir., 1979).[3]

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[2] The record is unclear concerning the circumstances under which a public defender was appointed. The record shows that a public defender was appointed at some point between August 29 and September 3, 1980, and appeared at Espinoza's arraignment on the weapons charge (see Pet., p.4, App. 2, and App. 22).

[3] But see, Silva vs. Estelle, 672 F.2d, 457 (5th Cir., 1982) where the Fifth Circuit reached the opposite result and held that a request by a defendant for permission to call his attorney at his arraignment was an invocation of his fifth amendment right to counsel. See also, People vs. Bladel, 365 N.W. 2d 56, 64 (Mich. 1984), where the Michigan Supreme Court states that the Fifth Circuit has reached conflicting results on this issue because it has not adequately distinguished the fifth and sixth amendment rights to counsel.

Both cases limited a defendant's request for counsel at arraignment to an invocation of his sixth amendment right to counsel. The Eleventh Circuit came to a similar result in a pre-Michigan vs. Jackson case, Collins vs. Francis, 728 F.2d 1322 (11th Cir.) (per curiam), cert, denied, 469 U.S. 963 (1984). reh'g denied, 469 U.S. 1143 (1985).

This Court's decision in Michigan vs. Jackson would dictate a different result in these cases if they were decided today:

> We also agree with the comments of the Michigan Supreme Court about the nature of an accused's request for counsel:
>
> "Although judges and lawyers may understand and appreciate the subtle distinctions between the fifth and sixth amendment rights to counsel, the average person does not. When an accused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel. It makes little sense to afford relief from further interrogation to a defendant who asks a police officer for an attorney, but permit further interrogation to a defendant who makes an identical request to a judge. The simple fact that defendant has requested an attorney indicates that he ddoes not believe that he is sufficiently capable of dealing with his adversaries singlehandedly."
>
> 475 U.S. at _____, 106 S.Ct. at 1409, n. 7, 89 L.Ed. 2d at 641, n. 7 (quoting the Michigan Supreme Court, People vs. Bladel, 421 Mich., at 63-64, 365 N.W. 2d at 67.)

In fact, the Fourth Circuit, relying on Michigan vs. Jackson, recently held, as did the Seventh Circuit, that a defendant invoked both his fifth and sixth amendment rights to counsel when he indicated at his arraignment that he wanted counsel. Wilson vs. Murray, 806 F.2d. 1323 (4th Cir., 1986).

The two Circuit - the Fourth and the Seventh - that decided this issue after this Court's opinion in Michigan vs. Jackson have acted in concert. The conflicting decisions by two Circuits - the Eleventh and the Fifth - were decied without the guidance of Michigan vs. Jackson.

Accordingly, this Court's decision in Michigan vs. Jackson has resolved any conflicts in the circuits. It is unnecessary to grant the petition for certiorari because the Seventh Circuit's opinion in this

case conflicts with the Fifth and Eleventh Circuit's pre-Michigan vs. Jackson decisions.

IV.

THE FACTS OF THIS CASE ARE UNIQUE AND DO NOT WARRANT REVIEW BY THIS COURT.

The petitioner argues that "there are compelling reasons to reject a per se rule in this particular case." (Pet. at 10) (emphasis added). This argument falls short because it is not the policy of this Court to grant a petition for a writ of certiorari based on the applicability of a particular rule (Edwards) to the facts of a "particular case."

Indeed, the Seventh Circuit in its opinion indicated that the facts of this case are unique:

> In the ordinary criminal prosecution, the defendant invokes his or her fifth and sixth amendment rights to counsel sequentially.... In this case, Espinoza did not invoke his rights to counsel in the usual sequence.... [ ] In the ordinary case, once the state has begun to prosecute an individual, attention is focused on the sixth amendment right to counsel. (App. at 5, 14) (emphasis added).

In addition, the fact that Espinoza was arraigned on an offense unrelated to the murder charge to which he ultimately confessed narrows the issues in this case even further. And the unrelated offense is the only fact that differentiates this case from this Court's recent opinion in Michigan vs. Jackson.

Furthermore, the Seventh Circuit set forth four very specific questions in its opinion (App. 6). Each of these questions had to have been answered affirmatively in order for the court to rule in favor of Espinoza. (app. 6). Each of these specific questions turned on the specific facts of this case and would not have a broad applicability.

Finally, the Seventh Circuit's well-reasoned opinion correctly applies this Court's opinions in Michigan vs. Jackson and Edwards to any interrogation of suspect who has invoked his fifth amendment right to

counsel and remains in continuous custody from the time of the invocation until interrogation. Such an application does not "create an unprecedented immunity for offenders fortuitously charge with unrelated crimes," (Pet. p.13) but rather protects these suspects, in the same manner as any suspect in police custody, from the "heightened potential for state-coerced self incrimination" (App. 15).

CONCLUSION

For these reasons, respondent respectfully requests this Court to deny the petition for writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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May 28, 1987

NO. 86-1765

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

JAMES W. FAIRMAN, Warden
Joliet Correctional Center,

Petitioner,

vs.

MIGUEL ESPINOZA,

Respondent.

CERTIFICATE OF SERVICE

I, WILLIAM H. WISE, a member of the Bar of the Supreme Court of the United States and counsel of record for MIGUEL ESPINOZA, Respondent herein, certify that on May 28, 1987, pursuant to Rule 28.3, Rules of the Supreme Court, I served one copy of the attached Motion For Leave to Proceed in Forma Pauperis and one copy of the attached Brief of Respondent in Opposition to the Petition for Writ of Certiorari on each of the parties herein, as follows:

On James W. Fairman, Petitioner, by depositing such copies in the United States Post Office, Chicago, Illinois, with first class postage prepaid, properly addressed to the Post Office address of Sally L. Dilgart, the above-named Petitioner's counsel of record, at 100 West Randolph Street, 12th Floor, Chicago, Illinois, 60601.

All parties required to be served have been served.

May 28, 1987
Dated

William H. Wise
WILLIAM H. WISE

Subscribed and Sworn to before
me this 28th day of May, 1987.

Notary Public
NOTARY PUBLIC

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